

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	No. 04 C 2806
)	
JIMENEZ LANDSCAPING)	
CORPORATION, PEDRO M. JIMENEZ, and)	Judge Shadur
PEDRO M. JIMENEZ, JR.,)	
)	
Defendants.)	

CONSENT DECREE

WHEREAS, the plaintiff, the United States of America, on behalf of the United States Army Corps of Engineers (the “Corps of Engineers”), filed a complaint against defendants, Jimenez Landscaping Corporation, Pedro M. Jimenez, and Pedro S. Jimenez (collectively, “the defendants”), alleging that the defendants violated § 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a);

WHEREAS, the complaint alleges that the defendants violated CWA § 301(a) by causing fill and/or dredged material to be discharged into waters of the United States located at 1516 Lily Lake Road, McHenry, Illinois 60050, legally described as PIN number 15-08-100-027 in the Northwest Quarter of Section 8, Township 44 North, Range 9 East in McHenry, Nunda Township, McHenry County, Illinois (“the site”);

WHEREAS, the complaint alleges that the discharge of fill and/or dredged material was without authorization by the Corps of Engineers and is more fully described in the complaint in this case;

WHEREAS, the complaint seeks an order: (1) requiring the defendants to restore the wetland on the property described in paragraphs 20 and 21 of the complaint; (2) enjoining the defendants from discharging any pollutant into navigable waters of the United States without a permit; (3) requiring the defendants to pay a civil penalty not to exceed \$27,500 per day for each violation of the Clean Water Act; (4) awarding the United States its costs in connection with this action; and (5) awarding the United States such further relief as this court deems just;

WHEREAS, the defendants deny the violations of the CWA alleged in the complaint;

WHEREAS, this consent decree is intended to constitute a complete and final settlement of the United States' claims under the CWA set forth in the complaint regarding the site;

WHEREAS, the United States and the defendants agree that settlement of this case is in the public interest and that entry of this consent decree is the most appropriate means of resolving the United States' damages claims under the CWA against the defendants in this case; and

WHEREAS, the court finds that this consent decree is a reasonable and fair settlement of the United States' claims against the defendants in this case, and that this consent decree adequately protects the public interest in accordance with the CWA and all other applicable federal law.

THEREFORE, before the taking of further testimony and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

I. Jurisdiction and Venue

1. The court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355 and 33 U.S.C. §§ 1311, 1319(b), and 1344.

2. Venue is proper in the Northern District of Illinois pursuant to CWA § 309(b), 33 U.S.C. § 1319(b), and 28 U.S.C. §§ 1391(b) and (c), because the subject property is located in this district, the causes of action alleged herein arose in this district, and the defendants are all located in the Northern District of Illinois.

3. The complaint states claims upon which relief can be granted pursuant to Sections 301, 309, and 404 of the CWA, 33 U.S.C. §§ 1311, 1319, and 1344.

II. Applicability

4. The obligations of this consent decree shall apply to and be binding upon the defendants, their agents, employees and servants, and successors and assigns and any person, firm, association or corporation who is, or will be, acting in concert or participation with the defendants whether or not such person has notice of this consent decree. In any action to enforce this consent decree, the defendants shall not raise as a defense the failure of any of their agents, employees, successors or assigns or any person, firm, association, or corporation acting in concert or participation with the defendants to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the site shall not alter or relieve the defendants of their obligations to comply with all of the terms of this consent decree. As a condition to any such transfer, the defendants shall reserve all rights necessary to comply with the terms of this consent decree.

III. Scope of Consent Decree

6. This consent decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties alleged in the complaint against the defendants under CWA § 301 concerning the site.

7. It is the express purpose of the parties in entering this consent decree to further the objectives set forth in CWA § 101, 33 U.S.C. § 1251. All obligations in this consent decree or resulting from the activities required by this consent decree shall have the objective of causing the defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA.

8. This consent decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this consent decree shall limit the ability of the Corps of Engineers to issue, modify, suspend, revoke, or deny any individual permit or any nationwide or regional general permit, nor shall this consent decree limit the EPA's ability to exercise its authority pursuant to § 404(c) of the CWA, 33 U.S.C. § 1344(c).

9. This consent decree in no way affects or relieves the defendants of their responsibility to comply with any applicable federal, state, or local law, regulation, or permit.

10. This consent decree does not relieve the defendants of liability for any violations of the Clean Water Act other than those alleged in the complaint.

11. This consent decree in no way affects the rights of the United States as against any person not a party to this consent decree.

12. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this consent decree and applicable law.

13. Nothing in this consent decree shall constitute an admission of fact or law by any party, except as provided in paragraphs 1 through 3.

IV. Specific Provisions

Civil Penalties

14. The defendants shall jointly pay to the United States a civil penalty in the amount of thirty thousand and No/100 dollars (\$30,000) according to the following schedule:

A. Fifteen thousand dollars (\$15,000) to be paid within thirty (30) days of entry of this Consent Decree; and

B. Fifteen thousand dollars (\$15,000) to be paid within ninety (90) days of entry of this Consent Decree.

15. Defendants shall make the above-referenced payment by FedWire Electronic Funds Transfer (“EFT” or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2004V00779. (Payment instructions may be obtained by the defendants by requesting them from the Financial Litigation Unit of the United States Attorney’s Office for the Northern District of Illinois.) Any payments received by the Department of Justice after 3:00 P.M. (Central Time) will be credited on the next business day.

16. Upon payment of the civil penalty required by this Consent Decree, the defendants shall provide written notice to the United States Attorney’s Office for the Northern District of Illinois that such payment was made in accordance with Paragraphs 14 and 15.

17. Civil penalty payments pursuant to paragraph 14 of this Consent Decree are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21, and are not tax deductible expenditures for purposes of federal law.

Restoration, Mitigation, and Preservation

18. The parties agree that the defendants have restored the wetland impact area such that the wetland impact area meets the definition of “wetland,” as defined by the 1987 Corps of Engineers Wetland Delineation Manual, and therefore no further restoration is necessary.

19. Following entry of this consent decree, the United States will contact the defendants to schedule a mutually agreeable date and time for the Corps of Engineers to conduct a delineation of the site in accordance with the 1987 Corps of Engineers Wetland Delineation Manual. The defendants may elect to have their own consultant present during the delineation and the defendants agree that this consultant, if elected, will have no rights to participation in or consultation with Corps officials concerning the wetland delineation performed by the Corps. Within 14 days after the Corps of Engineers completes the wetland delineation of the site, the defendants shall employ a professional surveyor to flag and survey the entire wetland boundary on the site and serve a copy of the survey on the Corps of Engineers and the United States Attorney’s Office for the Northern District of Illinois.

20. Before the actions in paragraph 19 above are taken, the defendants shall notify the Corps of Engineers of the date on which such actions shall be taken, and the Corps of Engineers will be present during such actions at the Corps of Engineers’ discretion.

21. The Corps of Engineers may, at its discretion, conduct a final inspection(s) within 30 days of the completion of the actions required by paragraph 19. If the inspection(s) determine that the actions described above were not properly conducted, the Corps of Engineers will notify the defendants in writing of additional corrective measures that are needed, and within 45 days of

receiving such notification the defendants will complete the additional corrective measures as directed by the Corps of Engineers.

Permanent Injunction

22. The defendants are permanently enjoined from discharging any pollutant into waters of the United States without a CWA permit.

V. Stipulated Penalties

23. After entry of this consent decree, if the defendants fail to timely fulfill any requirement of the consent decree they shall pay a stipulated penalty to the United States for each violation of each requirement of this consent decree as follows:

- | | | |
|----|--|--------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$500.00 per day |
| B. | For Day 31 up to and including Day
60 of non-compliance | \$1,000.00 per day |
| C. | For Day 61 and beyond | \$1,500.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

VI. Dispute Resolution

24. The parties shall use their best efforts to resolve all disputes arising under this consent decree informally and in good faith. If, however, disputes arise concerning this consent decree that the parties are unable to resolve informally, any party may, by written motion, submit the matter to the court for resolution.

VII. Addresses

25. All notices and communications required under this consent decree shall be made to the parties through each of the following persons and addresses:

A. To the Corps of Engineers:

Mitchell A. Isoe
Chief, Regulatory Branch
111 N. Canal, Suite 600
Chicago, Illinois 60606

B. To the United States Department of Justice:

Daniel M. Tardiff
Assistant United States Attorney
219 S. Dearborn Street, 5th Floor
Chicago, Illinois 60604

C. To Defendants:

Sheila H. Deely
Sasha M. Engle
Gardner Carton & Douglas LLP
191 N. Wacker Drive, Suite 3700
Chicago, Illinois 60606

VIII. Costs of Suit

26. Each party to this consent decree shall bear its own costs and attorneys' fees in this action. Should the defendants subsequently be determined by the court to have violated the terms or conditions of this consent decree, the defendants shall be liable for any costs or attorneys' fees incurred by the United States in any action against them for noncompliance with or enforcement of this consent decree.

IX. Public Comment

27. The parties acknowledge that, after the lodging and before the entry of this consent decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this consent decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this consent decree, unless the United States has notified the defendants in writing that it no longer supports entry of the consent decree.

X. Continuing Jurisdiction of the Court

28. This court shall retain jurisdiction over this action in order to enforce or modify the consent decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this consent decree. During the pendency of the consent decree, any party may apply to the court for any relief necessary to construe and effectuate the consent decree.

XI. Final Judgment

29. Upon its entry by the court, this consent decree shall have the force and effect of a final judgment.

XII. Right of Entry

30. Until termination of this consent decree, the United States and its authorized representatives and contractors shall have authority at all reasonable times to enter the site to perform the following activities:

- (i) monitor the activities required by this consent decree;
- (ii) verify any data or information submitted to the United States;
- (iii) obtain samples;
- (iv) inspect and evaluate the defendants' restoration/mitigation activities;
and
- (v) inspect and review any records required to be kept under the terms
and conditions of this consent decree and the CWA.

The United States, or its authorized representatives, shall make a good faith effort to provide reasonable advance notice to the defendants prior to any inspection. The defendants may elect to be present at any inspection of the site by the United States or its authorized representatives and shall have the right to split any samples and obtain a copy of any data obtained from the inspection.

31. This "Right of Entry" provision of this consent decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring, and to obtain information from the defendants as authorized by law.

XIII. Termination

32. Except for Paragraph 22, this Consent Decree may be terminated by either of the following:

A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Defendants have obtained and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months;

2. Defendants have paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;

3. Defendants have certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all parties; and

4. Within forty-five (45) days of receiving such certification from defendants, the Corps of Engineers has not contested in writing that such compliance has been achieved. If the Corps of Engineers disputes the defendants' full compliance, this Consent Decree shall remain in effect pending resolution of the dispute by the parties or the Court.

IT IS SO ORDERED.

Dated and entered this _____ day of _____, 2005.

United States District Judge

ON BEHALF OF THE UNITED STATES:

PATRICK J. FITZGERALD
United States Attorney

By:

DANIEL M. TARDIFF
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 886-1390

Dated: _____

ON BEHALF OF Defendants:

Jimenez Landscaping
Corporation

PEDRO M. JIMENEZ
Owner

Date

Pedro M. Jimenez

PEDRO M. JIMENEZ

Date

Pedro S. Jimenez

PEDRO S. JIMENEZ

Date